

THE MATTER OF ARBITRATION BETWEEN

**MINNESOTA ASSOCIATION OF
PROFESSIONAL EMPLOYEES,**

Union,

and

**STATE OF MINNESOTA,
DEPARTMENT OF HUMAN
SERVICES,**

Employer.

**SCHMUCKER TERMINATION
GRIEVANCE**

Arbitrator: Stephen F. Befort

Hearing Date: January 26, 2016

Post-hearing briefs received: February 16, 2016

Date of Decision: March 4, 2016

APPEARANCES

For the Union: David Kamper

For the Employer: Elisabeth Brady

INTRODUCTION

Minnesota Association of Professional Employees (Union), as exclusive representative, brings this grievance claiming that the Minnesota Department of Human Services (Employer or DHS) violated the parties' collective bargaining agreement by discharging Walter Schmucker from his position as a Chaplain at Community Addiction Recovery Enterprise in Brainerd, Minnesota without just cause. The Employer asserts that the discharge was warranted because

the grievant failed to cooperate in submitting his fingerprints as part of a required background study. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUE

Did the Employer have just cause to terminate the employment of Walter Schmucker? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

Article 8 Discipline and Discharge

Section 1. Purpose. Disciplinary Action may be imposed only for just cause and shall be corrective where appropriate.

Article 14 Leaves of Absence

Section 3. Unpaid Leaves of Absence.

J. Unpaid Administrative Leave. At the Appointing Authority's discretion, an employee may be placed on unpaid administrative leave when the employee is unable to work because of the temporary absence of a license, completed background check, or other credentials required for his/her position. After verification of reinstatement of license, successful background check or credentials required for the position, the employee shall be reinstated

FACTUAL BACKGROUND

The Employer Department of Human Services is a state agency that provides a broad range of services to individuals in need. One of these programs is the Community Addiction Recovery Enterprise (CARE) program which provides chemical dependency and substance

abuse services. The Employer also licenses and monitors non-DHS facilities that provide care to children and vulnerable adults.

The Employer hired the grievant, Walter Schmucker, as a Chaplain at the CARE program in Brainerd in 2010. In that capacity, Schmucker provided culturally-specific inpatient services to Native American clients seeking help with chemical addiction issues. The Chaplain position is one of considerable respect in the Native American community.

Sometime after being employed by CARE, Mr. Schmucker began to volunteer at the Mille Lacs Academy, a private facility licensed by DHS to treat juvenile sex offenders, where he primarily performed cleansing ceremonies in sweat lodges on weekends. Under Minnesota law, both employees and volunteers having direct contact with clients served by a facility licensed by DHS are subject to background checks. In July 2012, Schmucker authorized Mille Lacs Academy to request DHS to conduct a background study relating to his volunteer service.

On January 12, 2013, the Licensing Division of DHS sent Mr. Schmucker a certified letter requesting that he provide a set of fingerprints as part of the background study. The letter stated:

Mille Lacs Academy submitted a background study request for you because you have direct contact with, or access to, persons receiving services under their license. As part of the study, the Division of Licensing received information that there may be criminal history information about you in another state. Pursuant to Minnesota Statutes, section 24C.05, subd. 5, “when the commissioner has reasonable cause to believe that further information may exist on the subject, the subject shall provide a set of classifiable fingerprints obtained from an authorized law enforcement agency.”

HOW TO SUBMIT FINGERPRINTS:

1. Take the enclosed fingerprint card to a police station to get fingerprinted .
..
3. You have 15 days after receiving this letter to send the fingerprints back to the Department of Human Services.

WHAT WILL HAPPEN:

1. Fingerprints submitted without your signature, and the date and signature of the official taking the fingerprints, will be rejected. If your fingerprints are not submitted within 15 days Mille Lacs Academy will be notified that you are disqualified and will be ordered to immediately remove you from any position allowing direct contact with, or access to, persons receiving services from their program. **Other programs will also not be allowed to place you in any position allowing direct contact with, or access to, persons receiving services.**

* * *

Even if you are no longer working at Mille Lacs Academy, you may still send in your fingerprints.

It is undisputed that Mr. Schmucker did not submit his fingerprints within fifteen days of the January 12, 2013 letter, or for that matter, at any time over the course of the next six months. At the arbitration hearing, Mr. Schmucker testified that he did not submit the requested fingerprint information because he had ceased volunteering at Mille Lacs Academy. He testified that his understanding of the January 12 letter was that if he did not submit fingerprints he would be disqualified only from working at Mille Lacs Academy or in some new DHS position.

On May 2, 2013, the Licensing Division notified both CARE and Mr. Schmucker of the issuance of an “Order for Immediate Removal.” The letter to CARE stated:

This letter is to inform you that the above named individual [Walter Schmucker] is disqualified because s/he did not cooperate with the background study. You are hereby ordered to immediately remove this individual from any position allowing direct contact with, or access to, persons receiving services from your program.

On May 8, 2013, the Employer informed Mr. Schmucker of its intent to discharge him effective May 10, 2013. The grounds for termination stated in the discharge letter was because “of failure to cooperate with background study requirements.”

The Union filed a step 2 grievance challenging the discharge on May 22, 2013. At a step 2 hearing on July 10, 2013, the Employer denied the grievance, but Human Resource Consultant Laina Carlson testified that she told the Union representative after the hearing that Mr. Schmucker should work with the Licensing Division to take care of the background study problem. She suggested that perhaps some resolution could be worked out if the background study was completed in the near future. Ms. Carlson testified that she did not receive any response to this overture from either the Union or Mr. Schmucker. Mr. Schmucker eventually did submit his fingerprints and DHS issued a background study clearance in August of 2013. By that time, the Employer had already filled the Chaplain vacancy with another employee.

At the hearing, the parties introduced evidence of Mr. Schmucker's compliance with other background study requests. In 2009, he submitted fingerprints as part of a background study relating to his desire to be an adoptive parent. In 2010, he was the subject of a background check because of his application for employment with CARE. He cooperated with that study, although the Employer erroneously failed to request a fingerprint submission as part of that study.

POSITIONS OF THE PARTIES

Employer:

The Employer contends that it had just cause to discharge Mr. Schmucker for failing to comply with a background study request, thereby losing his ability to have contact with CARE clients. The Employer maintains that Mr. Schmucker received a clear directive to submit fingerprint information as part of a background study and that the directive clearly warned about disqualification for noncompliance. In spite of this directive, Mr. Schmucker failed to submit the fingerprints information in a timely fashion. The Employer asserts that it acted reasonably in

terminating Mr. Schmucker's employment after receiving the Licensing Division's Order for Removal so as to avoid the loss of program licensure. In terms of a remedy, the Employer argues that Minn. Stat. § 245C.09, subd. 2 authorizes an employer to terminate an employee who fails to cooperate with a background study. The Employer also maintains that it was under no obligation to place Mr. Schmucker on a leave of absence pending completion of the background study.

Union:

The Union maintains that the Employer did not have just cause to support its discharge decision. The Union first argues that the January 12, 2013 letter directing Mr. Schmucker to submit fingerprint information only mentioned Mille Lacs Academy and not the CARE program. As a result, Mr. Schmucker reasonably believed that since he had ended ties with Mille Lacs Academy he was no longer required to submit the requested fingerprint information. The Union additionally argues that the penalty of discharge is too harsh of a sanction in any event. The Union maintains that the Order for Removal and Minn. Stat. § 245C.09, subd. 2 did not mandate his termination, but only that he not be in a position of contact with clients. Accordingly, the Union argues that the Employer could have temporarily assigned Mr. Schmucker to a noncontact position or placed him on a leave of absence.

DISCUSSION AND OPINION

In accordance with the terms of the parties' collective bargaining agreement, the Employer bears the burden of establishing that it had just cause to support its disciplinary decision. This inquiry typically involves two distinct steps. The first step concerns whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining

question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See* ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 15-23 (7th ed. 2012).

A. The Alleged Misconduct

The Employer contends that Mr. Schmucker engaged in misconduct by failing to cooperate in a required background study. Under Minnesota law, any employee or volunteer who provides services to clients in facilities operated by or licensed by DHS must pass a background check. Minn. Stat. § 245C.05, sub. 1. For individuals like Mr. Schmucker who have been convicted of a crime in another state, the individual must submit fingerprint information as part of the background study. Minn. Stat. § 245C.05, subd. 5(b)(3).

The background study requirement was triggered in this instance by Mr. Schmucker's performance of volunteer activities for Mille Lacs Academy. On January 12, 2013, the DHS Licensing Division sent a letter to Mr. Schmucker directing him to submit fingerprint information within fifteen days. The letter went on to state that if fingerprints are not submitted within fifteen days, he would be disqualified from any position at Mille Lacs Academy or from placement in a position at any other program having contact with persons receiving services.

It is undisputed that Mr. Schmucker did not comply with this directive. Indeed, he did not submit the requested fingerprint information until August 2013. Under these circumstances, the Employer has adequately established the existence of the underlying conduct warranting disciplinary action.

The Appropriate Remedy

The Employer argues that Minnesota law provides a statutory just cause basis for terminating an employee who fails to cooperate with a background study. In this regard, Minn. Stat. § 245C.09, subd. 2 states:

An individual's failure or refusal to cooperate with the background study is just cause for denying or terminating employment if the individual's failure or refusal to cooperate could cause the applicant's application to be denied or the license holder's license to be immediately suspended or revoked.

The Employer argues that CARE could have suffered an immediate termination of its license if it had permitted Mr. Schmucker's employment to continue after receiving the Licensing Division's Order for Removal.

The Employer's position, however, is overstated. Pursuant to Section 245C. 17, the consequence for an individual who fails to cooperate in a background study is not termination, but disqualification from a position allowing direct contact with program clients. The Licensing Division's Order for Removal similarly did not require termination, but only that the license holder "immediately remove this individual from any position allowing direct contact with, or access to, persons receiving services from your program." Accordingly, it appears that CARE could have complied with the Order for Removal by transferring Mr. Schmucker to a noncontact position or by placing him on an unpaid leave of absence pending completion of the background study. Although Article 14, Section 3(J) gives the Employer discretion to grant or withhold a leave of absence in such circumstances, an administrative leave was a viable alternative to discharge.

Under these circumstances, section 245C.09, subd. 2 does not compel termination. Instead, the just cause provision of the parties' contract provides the pertinent standard for analysis.

The Union contends that two ameliorating factors warrant a lesser sanction. First, the Union asserts that Mr. Schmucker's performance as Chaplain was satisfactory and did not provide grounds for discipline. Second, the Union contends that Mr. Schmucker reasonably could have construed the January 12, 2013 letter from the Licensing Division as not requiring him to follow through with the fingerprint submission request. That letter only mentioned Mr. Schmucker's association with Mille Lacs Academy as the basis for the background study, and not the CARE program. Since Mr. Schmucker had ceased contact with the Academy, it was not unreasonable for him to conclude that the background study was no longer required. In fact, the letter stated that "even if you are no longer working at Mille Lacs Academy, you may still submit your fingerprints." The use of the word "may" arguably suggests that the fingerprints were only optional under the circumstances.

While these factors suggest that discharge is too harsh of a sanction, other factors suggest that missteps by the grievant also contributed to his separation from employment. First, if Mr. Schmucker found the letter directing him to submit fingerprint information to be unclear, he could have contacted the telephone number listed on the January 12, 2013 letter for clarification. Second, given Laina Carlson's testimony that she told the Union representative after the step 2 hearing that perhaps some resolution of Mr. Schmucker's situation could be worked out if the background study was completed in a timely manner, Mr. Schmucker's failure to follow through with a timely response likely contributed to the Employer filling the Chaplain position with someone else during the summer of 2013.

Balancing these considerations, I conclude that the grievant should be reinstated, but that the Employer should not be responsible for any lost pay or benefits.

AWARD

The grievance is sustained in part and denied in part. The Employer is directed to reinstate the grievant, but without responsibility for any loss of pay or benefits. The grievant's personnel file shall be modified to reflect this determination. The Arbitrator will retain jurisdiction for 60 days to address any remedial issues as may be necessary.

Dated: March 4, 2016

Stephen F. Befort
Arbitrator